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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. [redacted] 94

JOHN A ACREE, and A. O. BAILEY, and H. M. SEVERN, and J. D. RANDOLPH, and C. H. CONKLIN, and D. L. CRABTREE, for themselves individually, and for, and as members of, a class of other persons similarly situated,

Petitioners

versus

AIR LINE PILOTS ASSOCIATION, an unincorporated association, and EASTERN AIR LINES, INC., a corporation,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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No. _____

In The

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OCTOBER TERM 1967

JOHN A. ACREE, And A. O. BAILEY, and H. M. SEVERN, and J. D. RANDOLPH, and C. H. CONKLIN, and D. L. CRABTREE, for themselves individually, and for, and as members of, a class of other persons similarly situated,
Petitioners

v.

AIR LINE PILOTS ASSOCIATION, an unincorporated association, and EASTERN AIR LINES, INC., a corporation,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Your Petitioners, John A. Acree, A. O. Bailey, H. M. Severn, J. D. Randolph, C. H. Conklin and D. L. Crabtree, who bring this action in behalf of themselves individually, and for other individuals who are similarly situated, pray that a Writ of Certiorari issue to review the judgment of the U. S. Court of Appeals for the Fifth Circuit entered February 13, 1968.

JUDGMENT AND OPINION BELOW

The opinion of the U. S. Fifth Circuit Court of Appeals in this proceeding is reproduced in Appendix A to this Petition;

and its judgment herein is reproduced in Appendix B hereto.

The opinion of the U. S. District Court Atlanta Division of the Northern District of Georgia, from which Appeal was taken to the U. S. Fifth Circuit Court of Appeals, is reproduced as Appendix C to this Petition.

JURISDICTION

The judgment of the Court of Appeals (Appendix B) was entered February 13, 1968. The jurisdiction of this Court is invoked under 28 U. S. Code Section 1254(1).

QUESTION PRESENTED

This is a suit asserting individual and personal rights by a number of individuals who were formerly employed by Respondent Eastern Air Lines as flight engineers in Eastern's cockpit flight crews. Respondent, Air Line Pilots Association (herein, ALPA) has historically been the statutory collective bargaining representative for the bargaining unit of Eastern's pilots. The Flight Engineers International Association (herein, FEIA) has historically been the statutory collective bargaining representative for the much smaller bargaining unit of Eastern's flight engineers; however, FEIA is not a party here and none of its institutional representational or jurisdictional rights under the Railway Labor Act are asserted here. Petitioners, here, assert their individual and personal rights and seek redress in damages from Respondent ALPA based upon the conduct of ALPA (as set forth in the Complaint, and as more particularly discussed herein in the Statement of the Case, infra) by which

ALPA coerced and compelled Eastern, through costly and ruinous featherbedding, to agree in effect to replace Eastern's traditional flight engineers, your Petitioners, with a number of ALPA's then unemployed pilot members -- all, in violation of ALPA's duty implied under the Railway Labor Act.

Since these said developments also imperiled FEIA's collective bargaining status, FEIA previously brought suit for injunctive relief against Eastern and ALPA for alleged violations of FEIA's representational or jurisdictional rights under the Railway Labor Act as representative for the bargaining unit of Eastern's flight engineers. But the District Court, prior to trial, denied a temporary injunction based upon its conclusion that it lacked jurisdiction over the subject matter since such representational and jurisdictional issues were within the exclusive jurisdiction of the National Mediation Board under the Railway Labor Act. And, the Second Circuit Court of Appeals affirmed that said ground for denial. 208 F. Supp. 182, 50 LRRM 2929 (S.D.N.Y., 1962), affirmed 311 F. 2d 745, 52 LRRM 2153 (CA 2, 1963).

Thereafter, FEIA amended its complaint in that District Court to seek: First, an order that Eastern bargain with FEIA as exclusive bargaining representative of Eastern's flight engineers; and Second, a declaratory judgment declaring that a number of related agreements between Eastern and ALPA were void, that FEIA have judgment for general and exemplary damages, and that Eastern reinstate its flight engineers. But, the District Court dismissed the complaint, prior to trial, on Defendants Motion for Summary Judgment on the ground that the

Court lacked jurisdiction over the subject matter since FEIA was asserting essentially a representational and jurisdictional claim that was within the exclusive jurisdiction of the National Mediation Board. 243 F Supp. 701, 59 LRRM 2865 (S.D.N.Y., 1965). The Second Circuit Court of Appeals affirmed the dismissal by the lower court expressly upon the ground of ". . . lack of jurisdiction over the subject matter . . . .", 359 F 2d 303, 62 LRRM 2374 (1966). (This Second Circuit Decision is found in Appendix D herein).

In this instant proceeding the District Court, prior to trial, dismissed this complaint upon the alleged grounds: First, that these individual personal claims by Eastern's former flight engineers, your Petitioners, involved a representational and jurisdictional dispute between FEIA, ALPA, and Eastern, which was within the exclusive jurisdiction of the National Mediation Board under the Railway Labor Act; and Second, that, even though these individual plaintiffs were not parties to the aforesaid litigation brought by FEIA and even though FEIA is not a party to this proceeding, these individual claims are barred under the doctrine of res judicata by the aforesaid Second Circuit Court of Appeals Decision (Appendix D herein) in the proceeding brought there by FEIA. (Appendix C herein) The U. S. Fifth Circuit Court of Appeals affirmed the District Court's dismissal and based its affirmance entirely upon this said second ground of res judicata. (Appendix A herein). Since your individual Petitioners were not parties to that said Second Circuit Proceeding, the Fifth Circuit apparently based its ruling upon the legal proposition that a general presumption of privity

exists between a Railway Labor Act union (here FEIA) and a bargaining unit employee (Petitioners), with respect to the individual and personal rights of the bargaining unit employee.

(a) Thus, the specific question presented to this Court is: Whether the Fifth Circuit Court of Appeals was correct in holding that the aforesaid Second Circuit Court of Appeals decision (Appendix D Herein) in the proceeding brought by FEIA bars the individual and personal claims by these individual flight engineers, your Petitioners, presented in this proceeding, based upon wrongs done by the Pilots Union, ALPA, to their individual and personal job rights, as Eastern's historical flight engineers.

(b) However, Petitioners also ask this Court to decide the underlying question raised by the Fifth Circuit's aforesaid general presumption of privity between a Railway Labor Act union and the individual bargaining unit employees; since Petitioners believe that this said legal presumption by the Fifth Circuit is erroneous (at least with respect to those individual and personal rights of bargaining unit employees that do not derive from a collective bargaining contract), and that it poses, as a precedent, the greatest peril to the security of individual bargaining unit employees in many varied situations under both the Railway Labor Act, and the National Labor Relations Act, as amended. This underlying basic question is as follows: Is there a general presumption of law that privity, within the concept of the doctrine of res judicata, exists between a Railway Labor Act union and the individual employees

within its respective bargaining unit, with respect to those individual and personal rights of the individual bargaining unit employees that do not derive from a collective bargaining contract?

STATUTE INVOLVED

Petitioners assert here their individual personal claims primarily against Respondent ALPA, and these individual and personal claims are based upon ALPA's breach of a duty implied from the Federal RAILWAY LABOR ACT (herein RLA), Chapter 8, Title 45, of the United States Code, as amended; which duty prohibited ALPA, as a powerful union representing practically all of the pilots in the commercial aviation industry, including Eastern's pilots, from (as alleged in the complaint) abusing its statutory powers and bargaining franchise through the hostile and discriminatory coercion of Eastern (by means of costly and ruinous featherbedding) to assign the historical work and duties of Eastern's traditional flight engineers, your individual Petitioners, to ALPA's then unemployed pilot members.

STATEMENT OF THE CASE

Since your individual Petitioners base their claims here entirely upon ALPA's breach of their individual and personal rights implied under the RLA (these said implied rights of Petitioners are more fully stated, infra, under the title, Reasons Review Should Be Granted), the United States District Court below had original federal question jurisdiction in this proceeding.

The allegations of the complaint, if proven, show essentially the following

facts and circumstances: At all material times Respondent Air Line Pilots Association (herein, ALPA), a Pilots' Union, has been the statutory collective bargaining representative for the bargaining unit of pilots in the employ of Respondent Eastern Air Lines (herein, Eastern), as well as for units of the pilots of most other domestic commercial airlines. ALPA has a virtual monopoly in the aviation industry over pilots and their interests, and thus ALPA is a major power in the industry. Prior to June, 1962, there had historically been a separate and much smaller collective bargaining unit consisting of the third cockpit crew member on Eastern's larger flights, who had historically performed the work and duties of flight engineer under a Federal Aviation Agency's (FAA) flight engineer certificate. The Flight Engineers International Association (herein, FEIA) had historically been the statutory collective bargaining representative for the bargaining unit of these Eastern Flight engineers.

The advent of the jet age around the time of the early 1960's fostered the prospect (and the fact to some extent) of a temporary but indefinite period of unemployment among some of ALPA's pilots at Eastern, as well as at other airlines in the Industry. This prospect of technological unemployment resulted from the fact that jet aircraft were much larger and much faster than conventional propellor driven aircraft. But, Eastern's flight engineers, as well as those of other commercial airlines, were not thus threatened with unemployment by the advent of the jets, since the jets, being larger aircraft, generally required the presence of an FAA certified flight engineer in the cockpit crew; whereas

many of the smaller conventional propellor driven aircraft did not require a flight engineer aboard.

ALPA's response to this problem was featherbedding in its purest and most costly form. Specifically ALPA compelled Eastern (as well as several other larger commercial airlines), by strike action and threats thereof, to carry a wholly useless third pilot aboard jet flights; with the result that the normal three-man cockpit crew of pilot, copilot, and certified flight engineer, historically used and preferred by Eastern (and most other airlines) and officially sanctioned by the FAA as being safe and efficient, was enlarged on such flights to a four-man crew.

ALPA's imposition of this third pilot upon Eastern and other airlines was done pursuant to a formal mandatory resolution passed at one of its conventions in anticipation of the advent of the jet age and its related interim employment problems for pilots. Which resolution, in effect, compelled the airlines to use only pilots, who were employed as pilots, in all cockpit crew positions; and even prohibited reference to the historical job title of "flight engineer" and specified that the historical job of flight engineer would be referred to as "Second Officer". This resolution has remained in force and effect at all material times (R-99).

An additional motivation for the adamacy in ALPA's insistence, that only pilots would be allowed to occupy the normal three crew member positions at Eastern, was the fact that at all material times a merger was proposed and pending between Eastern and another commercial airline. A clearly contemplated result

of this proposed merger was the merger of the pilot seniority lists of each airline into a single seniority list and a substantial reduction of the same.

That this said imposition of the useless third pilot aboard such flights was nothing but featherbedding is shown by the statements of position announced in respect thereto by spokesmen for the FAA, Eastern, and other major airlines and expert authorities (Appendix E).

Consequently, during the tenure of this third pilot in 1961 and up until June of 1962, and as a result thereof, Eastern experienced an operating loss running into the millions of dollars (R-161). As a result of this ruinous operating loss suffered by Eastern from this unnecessary third pilot cost, and for no other reason, Eastern announced in 1962 that it was reducing its four-man jet flight crews back to the usual three-man crews; but, that the flight engineers historical seat on such flights would thenceforth be occupied only by trained and qualified pilots; notwithstanding that, governing federal law required the presence of a certified flight engineer as the third crew member, but did not require the flight engineer to be pilot trained or qualified; neither did federal law require a third pilot aboard the aircraft.

At all material times during these said events ALPA's aforesaid mandatory resolution, that all cockpit positions be occupied only by trained and qualified pilots and employed as pilots has remained in force. Eastern's flight engineers (being under persuasive political pressures from presidential

mediating commissions and representatives to avert disruption of operations) expressly declared, albeit reluctantly, to ALPA and Eastern that the flight engineers would satisfy ALPA's ultimatum by becoming trained and qualified as pilots, though not required by the FAA or federal law to do so; if ALPA would but give written assurance that it would not enforce its aforesaid mandatory policy of having none but pilots in the employ of the company as pilots occupy the flight engineers seat. But, ALPA neither disavowed its said mandatory all pilot resolution, nor gave this requested written assurance that it would not compel Eastern to oust its historical flight engineers, your Petitioners.

Under these circumstances Eastern's flight engineers commenced a work stoppage in an effort to prevent Eastern's said capitulation to ALPA's said mandatory resolution and coercion; however, the flight engineers were soon replaced by ALPA's excess pilots (who had previously been given expedited and specialized flight engineer training by ALPA, and by Eastern at ALPA's compulsion); with the eventual result that ALPA was elected (with the votes of its relocated pilots) as the statutory collective bargaining representative for the bargaining unit of those crew members performing the historical duties of flight engineer on Eastern's large flights.

Subsequently, FEIA instituted its litigation in the U. S. District Court for the Southern District of New York and in the U. S. Court of Appeals for the Second Circuit, based upon FEIA's institutional representational rights under the RLA, which has been discussed

herein, supra, under the title, Question Presented.

In the instant proceeding Eastern's former individual flight engineers who were replaced by ALPA's pilots as discussed above seek redress from ALPA, based upon individual and personal rights implied under the RLA, for wrongs done to them individually by ALPA -- i.e. the aforesaid coerced reassignment by Eastern of all their historical work and duties to only trained and qualified pilots solely as a result of ALPA's aforesaid imposition upon Eastern of this said coercive and ruinous third pilot featherbedding. Your Petitioners do not seek to alter, amend, modify or rescind in any way the representational, or jurisdictional position of ALPA; nor to revive the prior representational interest of FEIA (indeed, the Eastern Airlines Chapter of FEIA has long since been defunct).

Nevertheless, the Fifth Circuit Court of Appeals concluded that the said prior decision by the Second Circuit (Appendix D), denying FEIA's claims on jurisdictional grounds, also barred these individual and personal claims based wholly upon ALPA's violations of your Petitioners' individual and personal rights implied under the RLA.

REASONS REVIEW SHOULD BE GRANTED

(1) RESJUDICATA DOES NOT BAR THIS ACTION BECAUSE: FIRST, PETITIONERS WERE NOT PARTIES, EITHER IN NAME OR IN PRIVITY, TO THE SUBJECT SECOND CIRCUIT PROCEEDING AND FEIA, THE PLAINTIFF LABOR ORGANIZATION THERE, IS NOT A PARTY HERE; AND SECOND, PETITIONERS' INDIVIDUAL AND PERSONAL CAUSES OF ACTION HERE, (WHICH ARISE BY IMPLICATION FROM THE RLA AS A RESULT OF ALPA'S COERCIVE AND HOSTILE DESTRUCTION OF PETITIONERS' INDIVIDUAL JOB RIGHTS) ARE WHOLLY DIFFERENT AND INDEPENDENT FROM THE INSTITUTIONAL, REPRESENTATIONAL RIGHTS OF FEIA THAT FEIA ASSERTED IN THE PRIOR SECOND CIRCUIT PROCEEDING:

The claim of Petitioners here is that their personal rights as individual employees of Eastern were violated by Eastern's coerced reassignment to only trained and qualified pilots of the historical work and duties of Petitioners, as Eastern's traditional FAA-Certified Flight Engineers, solely as a result of ALPA's compulsion exerted upon Eastern.

ALPA's said compulsion (which has been more particularly described in the statement of the case, supra) violated the duty owed to each of Petitioners personally under the Railway Labor Act (herein, RLA). This duty is implied by law from the RLA; and generally speaking it prohibits a union, such as ALPA, from abusing its powers and bargaining franchise, derived from the RLA, by engaging in hostile and invidious discrimination towards employees, such as Petitioners, of the employers (such as Eastern) with whom the union deals in

collective bargaining. Steele vs. Louisville & Nashville R. Co., 323 U.S. 192, 89 L. Ed. 173, 15 LRRM 808 (1944); Brotherhood of Railroad Trainmen, et al, vs. Howard, 343 U.S. 767, 30 LRRM 2258 (1952); Tunstall vs. Brotherhood of Locomotive Firemen and Enginemen, U.S. 210, 89 L. Ed. 187, 15 LRRM 715 (1944); Graham vs. Brotherhood of Firemen, 338 U.S. 232, 25 LRRM 2033 (1949); Conley vs. Gibson, 355 U.S. 41, 41 LRRM 2089 (1957); Richardson vs. Texas & New Orleans RR Co., 242 F. 2d 230, 39 LRRM 2593 (CA 5, 1957); Syres vs. Oilworkers Union, 223 F 2d 739, 36 LRRM 2290, (CA 5, 1955) Reversed, 350 U.S. 892, 37 LRRM 2068; Central of Georgia R. Co. vs. Jones, 229 F. 2d 648, 37 LRRM 2435 (CA 5, 1956(, Cert. Denied; 352 U.S. 848, 38 LRRM 2716; Rolax vs. Atlantic Coast Line R. Co., 186 F 2d 473, 27 LRRM 2240 (1951); Thompson vs. Brotherhood of Sleeping Car Porters, F 2d, 63 LRRM 2111 (Sept. 1966).

While the Howard and Steele line of cases, which first established this said duty of RLA unions, dealt specifically with hostile and invidious discrimination based upon race, the Courts have made clear that the doctrine of those cases is not limited to racial discrimination alone, but extends to any other basis of hostile and invidious discrimination by RLA unions. Mount vs. Locomotive Engineers, 226 F 2d 604, 37 LRRM 2034 (CA 6, 1955); Cunningham vs. Erie Railroad, et al, 266 F 2d 411, 44 LRRM 2093 (CA 2, 1959); Thompson vs. Brotherhood of Sleeping Car Porters, 316 F 2d 191, 52 LRRM 2880 (1963); Brady vs. Trans World Airlines, 174 F. Supp. 360, 44 LRRM 2282 (D.C. Del. 1959); Ferro vs. Railway Express Agency, 296 F 2d 847, 49 LRRM 2278 (CA 2, 1961); Hargrove vs. Brotherhood of Locomotive

Engineers, 116 F. Supp. 3, 33 LRRM 2100 (D.C.D. Col. 1953) F. Supp. 681, 40 LRRM 2495 (D.C. W. Ky., 1957); Latham vs. Baltimore & Ohio RR Co., 274 F 2d 507, 45 LRRM 2534 (CA 2, 1959); Cherico vs. Brotherhood of R. R. Trainmen, 167 F. Supp. 635, 42 LRRM 2832 (S.D. N.Y., 1958).

These said implied rights of Petitioners under the RLA are personal to each of Petitioners as individual employees of Eastern; and these said personal rights and claims against ALPA did not belong to FEIA and neither was FEIA privy thereto; and thus FEIA could not have presented them in its said prior litigation. Indeed, the deciding Court in FEIA's said prior litigation expressly held that FEIA could not assert, and was not asserting, these said individual and personal claims of these individual Petitioners in its said prior litigation. That Court said:

> "It is possible to construe the first claim as one for wrongful discharge, and, indeed, individual employees discharged in violation of the Act are entitled to a remedy in the Courts. (Citations omitted) However, this remedy is available only to the individual employees and not to FEIA. . . .
>
> "It is clear from the amended or supplemental complaint that FEIA is seeking global damages for alleged wrong to it and not individual damages for such of its members who may have been wrongfully discharged." (Emphasis Added) (243 F Supp. 701, 59 LRRM 2865 (S.D.N.Y., 1965)).

Thus, your individual Petitioners were not parties, in name or in privity, to

this said prior litigation by FEIA; and neither were their said individual and personal claims adjudicated in FEIA's litigation there.

That your Petitioners do set forth a good cause of action here based upon their individual personal claims, is shown by the District Court's finding in its dismissal opinion, where the Court said: ". . . It is important to note that if plaintiffs' allegations are valid, such actions would constitute a violation of the Railway Labor Act. . . ." (Appendix C)

Thus, while Petitioners' instant claims are, under the Howard and Steele rationale, based upon Petitioners' independent, individual and personal rights deriving by implication from the Railway Labor Act, FEIA's cause of action asserted in its said prior litigation, was expressly based entirely upon those specific provisions found in the Railway Labor Act (Chapter 8, Title 45, United States Code) which accorded FEIA the right to statutory recognition as the collective bargaining representative of the bargaining unit of Eastern's flight engineers for purposes of collective bargaining. The District Court in that prior litigation made this point conclusively clear when it said, as noted earlier:

> "It is clear from the amended or supplemental complaint that FEIA is seeking global damages for alleged wrong to it, and not individual damages for such of its members who may have been wrongfully discharged."

That the thrust of FEIA's said prior litigation was essentially directed solely to the end of protecting FEIA's claimed

institutional recognitional rights is further shown by the total absence of any discussion, in either of the opinions by the District Court, or the Second Circuit Court, of the Howard and Steele rationale, relied upon here by your individual Petitioners to support these individual and personal claims. A search of those decisions in FEIA's prior litigation shows that neither the District Court there, or the Second Circuit Court attempted to consider, discuss, allude to, or adjudicate your Petitioners individual and personal claims, as such, deriving from the Howard and Steele rationale.

If Petitioners present individual and personal claims had been based upon a collective bargaining contract negotiated by FEIA, then conceivably FEIA could have pressed such contractual claims under the theory that it was maintaining the integrity of its collective bargaining contract for the bargaining unit as a whole. But, Petitioners individual and personal claims here are in no way based upon a collective bargaining contract; instead, they are based wholly upon the said non-abuse duty under the RLA impliedly owed by ALPA as a powerful monopolistic union to each of Petitioners personally, as individual RLA employees.

Thus, FEIA could not assert these personal claims of Petitioners as individual employees; and this fact defeats the instant conclusion by the Fifth Circuit here, that these individual Petitioners (who were not parties there) were in privity in FEIA's said prior litigation -- presumably, by reason of some theoretical implication of law deriving from FEIA's status as the statutory collective bargaining representative of the flight engineers bargaining unit.

Just as your individual Petitioners would have no standing to assert or foreclose FEIA's statutory institutional recognitional rights before a forum, neither could FEIA have any standing to assert or foreclose these said individual, personal, and noncontractual rights of Petitioners presented here. Thus there is no element of mutuality as required by the doctrine of res judicata.

(2) THE FIFTH CIRCUIT'S INSTANT DECISION HAS, IN EFFECT, INDIRECTLY REJECTED THIS COURT'S MAJORITY DECISION IN THE HOWARD CASE, AND HAS ADOPTED THE DISSENTING OPINION IN HOWARD:

Briefly stated, the Howard proceeding was a class action asserting that the defendant union and the employer there had violated an implied duty owed to that plaintiff class under the RLA by engaging in hostile and invidious discrimination against them because of their race. The defendant union there was the statutory collective bargaining representative for a bargaining unit consisting of an all white bargaining unit of brakemen; while the plaintiff class consisted of a much smaller bargaining unit of negro employees who were represented in collective bargaining by another union, which was not a party to that proceeding. Among other things the Complaint there alleged that the Brotherhood:

> ", . . had for years used its influence in an attempt to eliminate negro trainmen and get their jobs for white men who, unlike colored 'train porters', were or could be members of the Brotherhood. . . . the Brotherhood finally forced the Frisco to agree to discharge the

colored 'train porters' and fill their jobs with white men who, under the agreement, would do less work, but get more pay.

". . . (that the defendant Brotherhood) . . . had continually carried on a program of aggressive hostility to employment of negros for train, engine and yard service....

". . . that while this agreement did not in express words compel discharge of 'train porters', the economic unsoundness of keeping them after transfer of their 'brakemen' functions made complete abolition of the 'train porters' group inevitable. . . ."

The dissenting opinion in Howard objected to the majority opinion upon the grounds, First, that the defendant union did not represent the plaintiff class of "train porters" under the Act, and therefore the defendant union owed plaintiffs no duty to refrain from such hostile discrimination and exercise of its bargaining power and franchise. The majority, of course, rejected this viewpoint.

And Second, the dissent in Howard urged that the entire dispute was within the exclusive jurisdiction of the National Mediation Board, and in this respect the dissent there said:

". . . I think there was a dispute here between employees of the carrier as to whether the Brotherhood was the representative of the train porters, and that this is a matter to be resolved by the National Mediation Board, not the

> Courts. I would remand this case to the District Court to be dismissed as nonjusticiable."

But, the majority rejected this jurisdictional argument and stated in respect thereto:

> ". . . Nor does the dispute hinge on the proper craft classification of the porter so as to call for settlement by the National Mediation Board. . . . For the contention here with which we agree is that the racial discrimination practice is unlawful, whether colored employees are classified as 'train porters', 'brakemen', or something else.
>
> "Bargaining agents who enjoy the advantages of the Railway Labor Acts provisions must execute their trust without lawless invasion of the rights of other workers (Emphasis added)

Thus, the Court in Howard made clear that RLA employees who are adversely affected by an RLA union's abuse of its statutory power and franchise by hostile and invidious discrimination against such employees (even if done in the context of a representational and jurisdictional contest with a rival union), have an individual and personal claim against such RLA union; and, that this individual and personal cause of action in such employees is independent of any possible simultaneous institutional recognitional claim that the statutory collective bargaining representative of such abused employees might have in its own right under the Act. It should be recalled in this respect that the plaintiff class of

employees in the Howard proceeding, were represented in collective bargaining under the RLA by a union that was not a party to that proceeding.

Even if it were possible for FEIA to have exercised standing to present Petitioner's individual and personal claims deriving from the Howard and Steele rationale in FEIA's said prior litigation (although FEIA clearly did not, and could not, do so, and the District Court there expressly stated, as noted above, that FEIA did not do so), it must still be concluded that FEIA did not assert Petitioners' individual and personal claims there, by reason of the fact that neither the District Court or the Second Circuit considered, discussed, or even alluded to, the Howard and Steele rationale which is the basis for Petitioners' individual and personal claims presented here.

(3) THE FIFTH CIRCUIT'S GENERAL PRESUMPTION, THAT A UNION (HERE, FEIA) WHICH REPRESENTS A BARGAINING UNIT OF EMPLOYEES UNDER THE ACT BECOMES PRIVY TO A BARGAINING UNIT EMPLOYEE'S INDIVIDUAL AND PERSONAL RIGHTS, BY REASON OF THE UNION'S STATUS AS SUCH, DOES THE GREATEST VIOLENCE TO THE SECURITY OF INDIVIDUAL EMPLOYEES, AND UNNECESSARILY SUBJECTS EMPLOYEES TO TYRANNY BY POWERFUL UNIONS:

By operation of law a statutory collective bargaining representative has the power to represent all employees in the bargaining unit, even though a substantial minority of employees therein voted against that representative in its certification election. Thus, such union frequently acquires and maintains its bargaining powers and franchise by

operation of law, and not through a consensual arrangement.

Since there was no consensual basis whatever to support the Fifth Circuit's presumption of privity between your individual Petitioners here and FEIA, as to FEIA's said prior litigation in the Second Circuit, the Fifth Circuit apparently based its presumption of privity simply upon FEIA's then current status as the union having collective bargaining prerogatives for the bargaining unit in which Petitioners were then employed. In other words the Fifth Circuit, in effect, has apparently presumed that the Railway Labor Act (and perhaps the National Labor Relations Act) extinguishes all individual and personal rights of employees in a union's bargaining unit, and by operation of law merges the employee's individual and personal rights into the union's institutional rights.

But, while this presumption might be valid in the limited sense that collective bargaining as to wages, hours and terms and conditions of employment replaces individual bargaining with the employer, that more general presumption of privity through such merger, as here construed by the Fifth Circuit, finds no support in the history of the enforcement of either the RLA or the National Labor Relations Act.

As to the National Labor Relations Act, the proviso in Subsection (a) of Section 9 of that Act, 29 USC Section 159(a), reserving some measure of autonomy over individual grievances to the individual employee, suggests that the Federal Labor Policy is not to wholly merge and obliterate bargaining unit

employees' individual and personal rights with the union's institutional rights even in the purely collective bargaining area.

Similarly, this Court has pointed out that the individual political rights and preferences of bargaining unit employees are not merged into the political rights and preferences of the union as an institution. Machinest Union, et al vs. Street, et al, 367 U.S. 740, 48 LRRM 2345 (1961).

To further illustrate the independence of the individual and personal rights of a bargaining unit employee from the institutional rights of the union representing the bargaining unit, and thus the lack of privity between the individual employee and the union in respect thereto (at least, as to these individual and personal rights of an employee which do not derive from a collective bargaining contract), it seems fair to suggest that a union representing a collective bargaining unit would not by reason of such status have standing to usurp or preclude an individual bargaining unit employee's right to file, process, and litigate or settle a claim for State Workmen's Compensation; or a claim for State Unemployment Compensation, or a claim under wage and hour laws, or other personal claims that a bargaining unit employee might have against his employer of a tort or civil nature (and not involving a collective bargaining contract claim).

And further, it would seem fair to assume that a union representing a collective bargaining unit would have no privity or standing to usurp or preclude

the right of a bargaining unit employee to sue a competing rival union for its infliction of personal bodily injuries upon the bargaining unit employee, in the context of, and in furtherance of, a representational or jurisdictional dispute between such competing rival union by and through its authorized agents, and the injured employee's union.

For instance, if during the contest of this alleged representational or jurisdictional dispute between ALPA and FEIA, ALPA, by and through its authorized agents, had inflicted personal bodily injuries upon Petitioners as part of its efforts to further its ouster of Petitioners from their jobs, then presumably Petitioners would clearly have had individual personal claims against ALPA for such bodily injuries, as to which only such injured employees would have had standing to sue. And, presumably FEIA would have had no standing or privity as a party plaintiff in such proceeding to assert the bodily injury claims of the injured bargaining unit employees; notwithstanding, that the incumbent union, FEIA, would presumably have had standing to assert its simultaneous institutional representational or jurisdictional rights, deriving from the same course of conduct, before an appropriate forum. It would further seem fair to assume, in respect to this analogy, that the personal injury proceeding by the bargaining unit employees in such case, Petitioners here, would not preclude or effect FEIA's institutional proceeding before the National Mediation Board; and the converse of this proposition would likewise seem to be true.

These examples further illustrate the lack of mutuality and other necessary elements in the Fifth Circuit's general presumption of privity as between FEIA and your individual Petitioners, which are required by the doctrine of res judicata. Bigelow vs. Old Dominion Copper Mining & Smelting Co., 225 U. S. Ill. 56 L. Ed. 1009 (1911); Troxell vs. Delaware, Lackawanna & Western Railroad Co., 227 U.S. 434, 57 L.Ed. 586 (1912); North Carolina Railroad Co., vs. Story, 268 U.S. 288, 69 L. Ed. 959, 962 (1924); Railway Employees Department of American Federation of Labor vs. Virginia Railway Co., 39 F. Supp. 354 (D.C. Va. 1941); United States, Libeland & Appellant vs. The Haytian Republic et al, 154 U.S. 118, 38 L. Ed. 930, 934 (1893); Hughes vs. United States, 4 Wall 232, 18 L. Ed. 303 (1866); Radford vs. Myers, 231 U.S. 725, 58 L. Ed. 454 (1913); Barnett vs. Wolfolk, 140 SE 2d (Supreme Court of Appeals, W. Va. (1965); Stanley, Trustee vs. Dominy, 196 Ga. 192 (1943).

(4) THE FIFTH CIRCUIT COURT'S GENERAL PRESUMPTION OF PRIVITY AS BETWEEN FEIA AND YOUR INDIVIDUAL PETITIONERS HERE, AND ITS ACCOMPANYING CONCLUSION, THAT FEIA'S PRIOR LITIGATION PRECLUDES YOUR INDIVIDUAL PETITIONERS' PERSONAL CLAIMS PRESENTED HERE, TEND TO EMASCULATE THE PERSONAL RIGHTS AND PROTECTION AFFORDED PETITIONERS BY THE HOWARD AND STEELE RATIONALE AGAINST ABUSES BY POWERFUL UNIONS (SUCH AS ALPA), AND THUS INDUCES OTHER POWERFUL AND MONOPOLISTIC UNIONS TO SUCH COERCIVE ACTS AGAINST EMPLOYERS AND EMPLOYEES:

By concealing your Petitioners' individual and personal rights asserted here under the cloak of privity, so as to bar Petitioners' individual and personal claims under principals of res judicata supposedly

deriving from FEIA's said prior litigation in the Second Circuit, the Fifth Circuit Court has established a precedent which in large part extinguishes the protection afforded individual employees under the Howard and Steele rationale against coercion by aggressive, powerful and sometimes monopolistic unions.

The natural and probable result of such an extension of principles of privity, whereby individual employees are thus denied personal recourse against abuses of their individual job rights by powerful unions, would be an invitation to such powerful monopolistic unions to substitute threats, strikes and ruinous economic coercion and featherbedding for the democratic election and jurisdictional dispute provisions and procedures provided in both the RLA, and the National Labor Relations Act, as amended, as the means of resolving such disputes.

Consequently, such an extension of principles of privity by the Fifth Circuit Court is repugnant to the Federal Labor Policy requiring a union, wishing to expand its representational or jurisdictional scope, to do so only by free persuasion in a democratic election and by available administrative procedures --not by exerting, as did ALPA here, ruinous economic coercion against an employer (here Eastern) to oust all employees who do not support its designs.

For, it would be safe to say that if ALPA, notwithstanding its monopolistic power and grasp upon the aviation industry, had known that its ruinous coercive featherbedding against Eastern, as a means of ousting these individual Petitioners, would expose it to the relief

sought here, then ALPA would most certainly have confined its expansion efforts to the available statutory procedures. And thus, Eastern and your Petitioners would have been saved many millions of dollars and frightful hardships.

(5) EVEN IF THE COURT SHOULD CONCLUDE THAT RESPONDENT EASTERN (AS TO WHOM PETITIONERS SEEK NO DAMAGES) IS UNDER NO DUTY TO REINSTATE YOUR INDIVIDUAL PETITIONERS, UNDER THE CIRCUMSTANCES PRESENTED HERE; NEVERTHELESS, YOUR PETITIONERS ARE, IN SUCH EVENT, ENTITLED TO THE REQUESTED REMEDY AGAINST ALPA, SINCE THE IMPLIED DUTY OWED BY ALPA TO PETITIONERS UNDER THE RLA IS INDEPENDENT OF ANY DUTY OWED BY EASTERN TO THE PETITIONERS UNDER THE ACT:

While Petitioners believe that under the law they are entitled to the remedy of reinstatement as to Eastern, nevertheless if this Court, in its wisdom, should conclude that Eastern should not be held to the reinstatement of Petitioners in view of the fact that Eastern's conduct complained of here came about solely as a result of ruinous economic compulsion imposed upon Eastern by ALPA; then in such case, Petitioners urge the Court to grant your individual Petitioners their day in court so that their individual and personal claims against ALPA might be fully and fairly adjudicated to an equitable conclusion as provided by law.

CONCLUSION

Based upon the foregoing, your Petitioners show: That they assert here claims which are personal to them as individual RLA bargaining unit employees; that these individual and personal rights of Petitioners are implied from the RLA,

and derived from a duty owed your Petitioners by Respondent ALPA, as an RLA union, which duty prohibited ALPA from abusing its statutory bargaining power and franchise through hostile and invidious discrimination against Petitioners as Individual RLA employees; and

That, while FEIA was the union that formerly served as the statutory collective bargaining representative for the bargaining unit of Eastern's flight engineers, in which unit Petitioners were formerly employed, nevertheless FEIA had no standing to bring Petitioners' instant individual and personal claims in FEIA's said prior litigation in the Second Circuit; since, Petitioners' rights asserted here, being implied from the RLA, do not derive from a collective bargaining contract, and these rights are personal to Petitioners individually; and

Thus, since FEIA had no standing to assert Petitioners' individual and personal rights in its said prior litigation; just as Petitioners would have had no standing to assert before the proper forum FEIA's institutional representational or jurisdictional rights expressed in the RLA, there was no privity between FEIA and these individual Petitioners as to FEIA's said prior litigation; and

That, if this Court should determine that Petitioners were not entitled to the remedy of reinstatement as to Eastern, in view of the fact that Eastern's actions complained of here resulted solely from the substantial economic coercion imposed upon Eastern by ALPA, as alleged in the complaint; then in such case, Petitioners are nevertheless entitled to their requested remedy against ALPA in the event

the allegations of the complaint are properly proved upon the trial of this matter.

Respectfully submitted this _____ day of May, 1968.

GILBERT & CARTER

By_____
Warren S. Gritzmacher

919 First Federal Building
Atlanta, Georgia 30303

By_____
Thomas L. Carter, Jr.

919 First Federal Building
Atlanta, Georgia 30303

Attorneys for Petitioners

PROOF OF SERVICE

This _____day of May, 1968, I have mailed two (2) copies of PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT to Mr. W. Glen Harland, Attorney at Law, Eastern Air Lines, Inc., Legal Department, 10 Rockefeller Plaza, New York, New York 10020 and Cohen and Weiss, Attorneys at Law, 605 Third Avenue, New York, New York 10016, Attorneys for Respondents.

_____
Warren S. Gritzmacher

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1967

No. 24626

D. C. Docket No. CA 9595

JOHN A. ACREE, ET AL.,
Appellants,

versus

AIR LINE PILOTS ASSOCIATION, ET AL.,
Appellees.

Appeal from the United States District Court for the Northern District of Georgia.

Before BROWN, Chief Judge, and GEWIN and WRIGHT,* Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

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*Of the District of Columbia Circuit sitting by designation.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants, John A. Acree, and others, be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

February 13, 1968

Issued as Mandate: Mar 7, 1968

APPENDIX C

ORDER OF DISTRICT COURT GRANTING DEFENDANTS' MOTIONS TO DISMISS

(Number and title omitted)
(Filed: Jan. 25, 1967)

The defendants in the above-styled action have filed motions to dismiss on the basis that the Court lacks jurisdiction and that the instant action is barred by the principle of res judicata.

The basis of the plaintiffs' complaint is that the defendants conspired in violation of the Railway Labor Act to deprive the plaintiffs of their positions with Eastern Air Lines.

The plaintiffs, as former flight engineers of Eastern Air Lines, Inc., have sued individually and on behalf of all flight engineers who were employed by Eastern on June 22, 1962. These former flight engineers, including the name plaintiffs, are the same persons who, as of June 22, 1962, were represented by EAL Chapter, Flight Engineers International Association.

Plaintiffs have requested injunctive relief, including an order directing Eastern to reinstate plaintiffs to its employ as flight engineers, a judgment declaring that conduct by defendants during and prior to a 1962 strike by Flight Engineers International Association against Eastern amounted to a conspiracy to deprive plaintiffs of their employment, and a judgment of more than $29,000,000 in compensatory and punitive damages against the defendant Air Line Pilots Association International.

The first issue which must be considered is that of jurisdiction. It is important to note that if the plaintiffs' allegations are valid, such actions would constitute a violation of the Railway Labor Act. It is clear that a mere allegation of a Railway Labor Act violation does not create federal court jurisdiction. General Committee v. Missouri-Kansas-Texas Railway Company, 320 U.S. 323 (1943).

In an attempt to establish jurisdiction, the plaintiffs allege hostile and invidious discrimination, thereby seeking to bring the case within the line of cases represented by Steele v. Louisville & Nashville R. Co., 323 U.S. 192 (1944), and Brotherhood of Railroad Trainmen, et al. v. Howard, 343 U.S. 768 (1952).

However, it is clear that the instant case does not fall within the doctrine of the Steele and Howard cases. It has been previously determined that complaints alleging matters and seeking relief which would directly or collaterally affect a representation decision of the National Mediation Board will not be heard. FEIA v. Eastern Air Lines, Inc., 359 F. 2d 303 (1966); Ruby v. American Airlines, Inc., 323 F. 2d 248 (1963), cert. den. 376 U.S. 913 (1964).

The principle enunciated in the above cases is basic and is a rudimentary principle of the law governing labor relations. Simply stated the principle is as follows: Congress has chosen to set up an administrative board, the National Mediation Board, to hear representative disputes. If a party is dissatisfied with the determination of that body, its recourse is to appeal the matter to the Court of

Appeals where review - though limited - is available. See Switchmen's Union of North America v. National Mediation Board, 320 U.S. 297 (1943). Thus, as the matter is one for determination by the Board, the claim is one which is beyond the subject matter jurisdiction of the district court. For the reasoning behind this principle, see FEIA v. Eastern Air Lines, Inc., supra, at 307-309.

In summary, the Court is of the opinion that it is without jurisdiction of the subject matter of the instant controversy. Not only is such a conclusion in line with a prior determination by another district court in a case involving the litigation of the same issues by the representative of the plaintiffs and the defendants, but it is also necessitated by the administrative structure created by Congress to handle matters arising under the Railway Labor Act. To rule otherwise would be to emasculate the power of the Board and to negate the value of its existence.

Though the Court is of the opinion that the instant case must be dismissed for lack of subject matter jurisdiction, it may be of value to examine the defendants' second basis in support of their motions to dismiss.

The defendants urge that even under the assumption that the Court has jurisdiction in the instant case the motion to dismiss must be granted on the bais of res judicata.

The basis of the plaintiffs' complaint is that the defendants conspired to discharge them and that such discharge was wrongful.

This complaint was dealt with and determined to be without merit in several decisions by the federal judiciary. See FEIA, EAL Chapter v. Eastern Air Lines, 208 F. Supp. 182 (1962), aff'd. per curiam 307 F. 2d 510 (1962), cert. den. 372 U.S. 945 (1963); FEIA v. Eastern Air Lines Inc., 243 F. Supp. 701 (1965), aff'd 359 F. 2d 303 (1966). Thus, in view of the fact that it has been determined previously, both judicially and administratively, that the discharges were not wrongful, the only remaining question to be answered is whether the plaintiffs in the instant case were in privity with the FEIA in the above litigations. Obviously, if the plaintiffs were in privity with the plaintiff who asserted the same cause of action in a prior suit which the plaintiffs seek to litigate here, the principle of res judicata bars this action.

Under the plaintiffs' allegation, it seeks to bring a class action on behalf of all members of FEIA who were discharged by Eastern. The FEIA was an unincorporated association acting as the personal representative of the plaintiffs. In sum, the FEIA was composed of the class which plaintiffs seek to represent; as an unincorporated association, it was no more nor no less than the class itself.

In conclusion, it is inherent in the principle of res judicata that a person whose interest was represented by one having authority to represent him is bound by the judgment even if he was not a formal party to the action. Hansberry v. Lee, 311 U.S. 32 (1940). It is obvious that the plaintiffs were aware of the legal efforts of their representative, and that their complaints have been

given a fair hearing before the federal bench.

Thus, the Court is of the opinion that the defendants' motion to dismiss must be granted on the basis that the Court is without subject matter jurisdiction, and that, even assuming the presence of such jurisdiction, the instant action would be barred under the principle of res judicata.

Therefore, the defendants' motion to dismiss is granted.

IT IS SO ORDERED.

This the 25th day of January, 1967.

s/ Lewis R. Morgan
LEWIS R. MORGAN

United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS

For the Second Circuit

No. 173 - September Term, 1965.
(Argued January 4, 1966
Decided April 12, 1966.)
Docket No. 29997

FLIGHT ENGINEERS INTERNATIONAL ASSOCIATION,
EAL CHAPTER, AFL-CIO,
Appellant,

-v.-

EASTERN AIR LINES, INC. and
AIR LINE PILOTS ASSOCIATION,
Appellees.

B e f o r e:

MOORE, SMITH and ANDERSON,
Circuit Judges.

Appeal from an order of the District Court for the Southern District of New York, Dudley B. Bonsal, Judge, granting summary judgment in favor of the defendants and directing the dismissal of plaintiff's amended or supplemental complaint for lack of jurisdiction over the subject matter. Affirmed.

I. J. GROMFINE, WASHINGTON, D.C.
(Herman Sternstein, William B. Peer, and Zimring, Gromfine &

Sternstein, all of Washington, D.C., and Patt & Heimowitz, New York, N.Y., with him on the brief), for appellant.

GEORGE G. GALLANTZ, New York, N.Y. (Larry M. Lavinsky, Saul G. Kramer, and Proskauer Rose Goetz & Mendelsohn, all of New York, N.Y.; W. Glen Harland and Gambrell, Harlan, Russel & Moye, Atlanta, Ga; with him on the brief), for appellee Eastern Air Lines.

HERBERT A. LEVY, New York, N. Y. (Henry Weiss and Cohen and Weiss, all of New York, N.Y., with him on the brief), for appellee Air Line Pilots Association.

MOORE, Circuit Judge:

This appeal presents another facet of the drawn-out controversy between the defendant Eastern Air Lines, Inc. (Eastern), the plaintiff Flight Engineers International Association, EAL Chapter, AFL-CIO (FEIA), and the defendant Air Line Pilots Association (ALPA). Portions of the controversy have previously come before the Civil Aeronautics Board, the National Mediation Board, and a variety of courts.

The opinion of the District Court ably sets forth the background of the dispute. 243 F.Supp. 701 (S.D.N.Y. 1965). Only the barest summary is necessary here.

Federal regulations require a crew of three - a pilot, a copilot, and a

certified flight engineer - in certain of the larger commercial aircraft. ALPA, which represented Eastern's pilots and co-pilots, and FEIA, which represented Eastern's flight engineers, clashed in 1958 over the license requirements of the flight engineer, the "third man in the cockpit." FEIA maintained that he should hold a mechanic's license (A & E license), held by FEIA members but not generally held by ALPA members. ALPA maintained that he should hold a pilot's license (P & I license), held by ALPA members but not generally held by FEIA members. After a strike by FEIA, Eastern agreed to a four-man crew, one member of which had to have a mechanic's license but did not have to have a pilot's license. This arrangement continued until 1962, with occasional strikes by FEIA and repeated attempts by presidential commissions and boards to solve the underlying problem of who should fill the third seat in the cockpit.

On June 23, 1962, FEIA again went out on strike, causing Eastern to shut down operations. In Mid-July Eastern offered to give pilot's training to FEIA flight engineers so that they would be eligible for occupancy of the third seat. FEIA did not accept the offer within the time set. Eastern then made the same offer individually to each of the striking engineers, informing them that if they did not report to work by July 24th, they might be replaced. On August 10, 1962, Eastern made a final proposal to the striking flight engineers, promising them prior job rights on propeller equipment but not on jets, and stating that those who did not accept the offer by August 16th would lose all prior job rights. Under the terms of agreements which Eastern reached with ALPA during this period, pilots who applied for the position of "pilot

engineer" - the new title given to occupants of the third seat in the cockpit - would suffer no loss of their pilot seniority.

On August 10th, Eastern began to replace the striking flight engineers with ALPA pilots and on August 25th Eastern notified all flight engineers still out on strike that they had been permanently replaced. FEIA and some of the striking flight engineers wrote Eastern on August 27, 1962, demanding that their discharge be processed as a grievance under the FEIA-Eastern collective bargaining agreement. Eastern rejected these demands on the grounds that the bargaining agreement had been terminated.

On September 27, 1962, FEIA offered to end the strike along the lines of settlement proposed by Eastern in July, provided that striking flight engineers could return to work in order of seniority. Eastern declined on the grounds that the strikers had been permanently replaced, so that there was no basis for further negotiation.

On September 28, 1962, FEIA informed Eastern that it would raise the replacement of the flight engineers as a formal grievance before the System Board of Adjustment established by the parties under the Railway Labor Act. Eastern refused to participate. As a result, the Mediation Board did not appoint a neutral member to the System Board of Adjustment.

Previous Litigation

FEIA has been seeking redress from Eastern and ALPA, together or separately, before a range of administrative and

judicial bodies since the summer of 1962, for wrongs alleged to have been committed during the summer of 1962. The history of these efforts is necessary to the resolution of the problem before us.

In the union's first attempt at administrative review, FEIA filed a complaint with the CAB alleging that Eastern had violated Section 410(k)(4) of the Federal Aviation Act, 49 U.S.C. §1371(k)(4), which makes compliance with the Railway Labor Act a condition for the holding of a certificate by an air carrier. The complaint alleged a number of violations of the Railway Labor Act by Eastern. The CAB dismissed the complaint, partly on the grounds that similar grievances were the basis of pending actions in the courts, and partly because the uncertain nature of the FEIA representation of the flight engineers was a question for the National Mediation Board to decide. The Court of Appeals for the District of Columbia Circuit held that this dismissal was not an abuse of discretion by the CAB, although the Court indicated that it believed the CAB had some independent jurisdiction to decide whether the Railway Labor Act had been violated. 332 F.2d 317 (D.C. Cir. 1964).

In 1964 FEIA sought a preliminary injunction to enjoin the National Mediation Board from holding an election to determine the bargaining representative of the flight engineers then working for Eastern, on the grounds that in determining who was qualified to vote in the representation election, the National Mediation Board had refused to investigate FEIA's charges of unfair labor practices. The district court held that the Mediation Board was

under no duty to hold hearing on such charges. 230 F. Supp. 611 (D.D.C. 1964). The Court of Appeals affirmed, indicating that the Mediation Board had made some investigation as to the voting rights of the ALPA pilots who had replaced FEIA engineers. 338 F. 2d 280 (D.C. Cir. 1964).

In the summer of 1962 FEIA brought suit in the Southern District of New York, seeking a preliminary injunction against Eastern on the grounds that Eastern had failed to bargain as required by the Railway Labor Act, and had bargained improperly by withdrawing earlier offers to the union and by writing to the individual employees The district court denied the relief requested on the grounds that FEIA had shown no clear and convincing evidence of unfair labor practices and had not demonstrated a reasonable probability of success after trial. This court affirmed on the opinion below. 208 F. Supp. 182 (S.D.N.Y.), aff'd per curiam, 307 F. 2d 510 (2d Cir. 1962), cert. denied, 372 U.S. 945 (1963).

FEIA started the present suit against Eastern and ALPA in the Southern District of New York on August 21, 1962, requesting that the defendants be preliminarily enjoined from alleged violations of the Railway Labor Act. The district court found on the merits that the procedures for bargaining under the Act had been exhausted so that the parties were free to resort to economic self-help; that Eastern had bargained in good faith with FEIA; and that Eastern had not conspired with ALPA against FEIA. The court denied the request for a preliminary injunction on the grounds that FEIA had not shown a reasonable chance of success at a full trial. 45 CCH Lab. Cas. ¶17,814 (1962). This court affirmed on

the ground that since the case involved problems of representation and problems of jurisdiction between labor unions, the district court was without jurisdiction to grant the relief which the plaintiff sought. 311 F.2d 745 (2d Cir.), cert. denied, 373 U.S. 924 (1963). In February 1964 FEIA filed an amended or supplemental complaint against Eastern and ALPA, requesting not only an injunction against Eastern ordering it to recognize FEIA as the exclusive bargaining representative of the flight engineers, but also a declaratory judgment declaring that the many agreements between Eastern and ALPA (November 12, 1958, January 1, 1959, July 20, 1962, August 3, 1962, and August 6, 1962) were void and unenforceable; a mandatory injunction directing that Eastern reinstate the striking FEIA flight engineers without prejudice, "ordering and directing Eastern to dismiss, if necessary, any employees hired to replace the striking Flight Engineers"; and a judgment for damages of $11,500,000, together with a similar sum "as exemplary damages."

Both defendants moved for summary judgment dismissing the amended complaint on the ground that the court was without jurisdiction to grant the relief requested. The district court granted the defendants' motions, partly on the ground that there was no evidence of violations of the act and partly on the ground that the district court lacked jurisdiction of the subject matter. 243 F. Supp. 701 (S.D. N.Y. 1965).

Much of the original complaint survives unaltered in its amended successor; and the passage of time has made these portions of the complaint no more a subject for judicial relief than they were at the time of the previous appeal. They still

involve jurisdictional and representational disputes between the two unions - disputes which, under the Railway Labor Act, are "for non-curial treatment." FEIA v. Eastern Air Lines, 311 F. 2d 745 at 748 (2d Cir.), cert. denied, 373 U.S. 924 (1963).

The amended complaint contains several new allegations: that the striking FEIA members were wrongfully discharged; that Eastern unlawfully conditioned the strikers' return to work on their relinquishment of seniority rights, and unlawfully gave superseniority to the ALPA replacements; and that Eastern unlawfully refused to process the grievances of the discharged employees and prevented the effective review of those grievances by the System Board of Adjustment.

These so-called new allegations (the replacement of the strikers, the demand for reinstatement of the discharged engineers and money damages) must be examined in the light of the many previous proceedings and decisions involving the controversies between Eastern, FEIA and ALPA as to the pilot-engineer status in the cockpit.

FEIA concedes that the determination of which union is to represent the occupants of the third seat in the cockpit is left to the National Mediation Board by Section 2, Ninth, of the Railway Labor Act. The National Mediation Board has made this determination. After deciding that both the strikers and their replacements could vote to choose a bargaining representative, it conducted a representation election, as a result of which it certified ALPA as the bargaining representative of the occupants of the third seat.

The allegations in the amended complaint which relate to the replacement of the strikers do not directly challenge the representational decision of the Mediation Board; but the judicial relief requested by FEIA flies "in the teeth of the board's certification" of ALPA, almost as much as a court order directing an employer not to bargain with a union flies in the teeth of the board's certification of that union. Order of Railway Conductors v. Pennsylvania R.R., 323 U.S. 166, 172 (1944). As the complaint itself recognizes, Eastern could afford to reinstate five hundred striking FEIA members only if it dismissed a comparable number of their replacements, most of whom voted for ALPA. The result would be a radical shift in the composition of the work force which might well make possible the ouster of ALPA by FEIA as the bargaining representative of the third-seat occupants.

The claim for money damages would have a similar effect. If granted in anything like the amounts requested, employers in similar situations in the future would never care to deal with unions newly certified by the National Mediation Board, until they could obtain declaratory judgments from the courts as to the validity of the ousted union's claims that the Railway Labor Act had been violated - a result which would clash with the evident congressional intent to have disputed questions of representation in an industry so charged with the public interest disposed of rapidly. See Ruby v. American Airlines, Inc., 323 F. 2d 248, 256 (2d Cir. 1963), cert. denied, 376 U.S. 913 (1964).

We do not mean to say that courts may never consider claims that the Railway Labor Act has been violated, if two unions are present. The second Ruby case makes clear

that even if two unions are on the scene, such claims may be heard by the courts in certain circumstances. Ruby v. American Airlines, 329 F. 2d 11 (2d Cir. 1964), vacated as moot sub nom. O'Connell v. Manning, 381 U. S. 277 (1965). But in that case, the issue was whether a court could order an employer to bargain with a union (the one most recently certified by the National Mediation Board); and that issue had been heard by no other court or administrative body. The allegations here more directly affect questions of representation; the relief requested, if granted, would to a large extent conflict with the certification of ALPA by the board; and many of the questions presented have previously been considered on the merits by the courts.

FEIA maintains broadly that Congress did not intend in the Railway Labor Act to create rights without remedies, and that as a result courts should step in to hear Railway Labor Act complaints where administrative agencies have declined to do so. The law is not that simple; nor is it application to the facts of this case. The Mediation Board considered the legality of the replacement of the strikers, at least to the extent of holding that the replacements were entitled to vote in the representational election. See FEIA v. National Mediation Board, 338 F. 2d 280, 282 (D.C. Cir. 1964).

Judge Levet found that the third seat positions on Eastern's jets were filled by replacements before Eastern's letter of August 3, 1962. This finding cuts the heart out of FEIA's argument that Eastern unfairly discriminated against the strikers by denying them access to work on jets. Judge Levet also found Eastern's temporary contracts with ALPA

were fair, and that Eastern had completely and permanently replaced all the strikers by August 25, 1962 - a finding inconsistent with FEIA's present claim that its members were discharged before they had been replaced. 45 CCH Lab. Cas. ¶17,814 (1962).

Moreover, it seems clear that Congress did not intend courts to hear claims under the Act whenever no administrative body would hear them. In certain narrow areas, where the command of the statute is clear and the issue does not impinge on one committed for resolution to other bodies, judicial enforcement of the Railway Labor Act has been held proper. E.g., Virginia R'y v. System Federation No. 40, 300 U.S. 515 (1937). Courts may also require the Mediation Board to carry on its statutory duties to investigate and to certify. Air Line Dispatchers Association v. National Mediation Board, 189 F. 2d 685 (D.C. Cir.), cert. denied, 342 U.S. 849 (1951). But the history of the Railway Labor Act, as interpreted by the Supreme Court, makes clear that in all other areas,

> "the command of the Act should be explicit and the purpose to afford a judicial remedy plain before an obligation enforcible in the courts should be implied. Unless that test is met the assumption must be that Congress fashioned a remedy available only in other tribunals. There may be as a result many areas in this field where neither the administrative nor the judicial function can be utilized. But that is only to be expected where Congress still places such great reliance on the voluntary process of conciliation,

> mediation and arbitration . . . Courts should not rush in where Congress has not chosen to tread."

General Committee of Adjustment v. Missouri-Kansas-Texas R.R., 320 U.S. 323, 337 (1943).

To grant the judicial relief requested in FEIA's wholesale attack on the replacement of the strikers would directly affect the previous determination of the representational dispute by the National Mediation Board,[1] would reopen a controversy which has plagued the airlines for years and which has been fought to a rough conclusion by resort to the self-help envisaged by the act; and would lay down a precedent that would mean the inordinate protraction of comparable struggles in years to come. For these reasons, we do not feel that courts should consider the claims for judicial relief in FEIA's amended complaint which are directly connected with the replacement of the strikers.

The last of the new allegations in the amended complaint, concerning Eastern's refusal to process grievances and its paralyzing of the System Board of Adjustment, raises somewhat different problems.

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[1] As the trial court stated in its opinion, "moreover, to entertain FEIA's claims for reinstatement of its members would be to bring into issue the certification of the Mediation Board of ALPA as the bargaining agent for Eastern's flight engineers." (243 F. Supp. at 707.)

The facts underlying FEIA's allegation are as follows. After Eastern told the striking engineers that they had been permanently replaced, FEIA and some of the strikers requested that the discharge of the engineers be processed as a grievance under the FEIA-Eastern collective bargaining agreement. Eastern refused to do so on the theory that the agreement had been terminated. The union attempted to bring the matter before the System Board of Adjustment, but the System Board split 2-2 on the problem. The collective bargaining agreement provided that if the System Board could not agree within a certain time, "it shall request the National Mediation Board to name a referee." Only the employee members of the System Board requested the naming of a referee, and the Mediation Board held that it had no power to name a referee under the circumstances. The District Court for the District of Columbia upheld the position of the Mediation Board, FEIA v. National Mediation Board, 230 F. Supp. 611 (D.D.C.), aff'd on other grounds, 338 F. 2d 280 (D.C. Cir. 1964). FEIA maintains that Eastern's refusal to join in the request for the appointment of a neutral referee was in violation of Eastern's duty under Section 204 of the Railway Labor Act "to establish a board of adjustment."

This issue is properly one for judicial consideration, since the relief requested is not the circumvention of the act's provisions for adjustment and mediation, but rather the enforcement of those provisions. IAM v. Central Airlines, Inc., 372 U.S. 682, 690 (1963); Aaxico v. Air Line Pilots Association, 331 F. 2d 433, 437 (5th Cir.), cert. denied, 379 U.S. 933 (1964); c.f. Virginian R'y v. System Federation No. 40, 300 U.S.

515 (1937). However, we agree with the trial court that since the collective bargaining agreement between the parties had terminated, Eastern was no longer under any obligation to process as grievances the allegations of the union, or to maintain the System Board of Adjustment for the resolution of the claims here asserted by the Union.

As the Supreme Court made clear in IAM v. Central Airlines, 372 U.S. 682, 690 (1963), "the extent and nature of the legal consequences" (Deitrick v. Greaney, 309 U.S. 190, 200-201) of the duty to establish a board of adjustment under Section 204 are to be determined by the courts. In making this determination, we must bear in mind the intended function of the System Boards of Adjustment: to resolve minor disputes, i.e., disputes as to the interpretation and application of existing contracts, as opposed to "major disputes connected with a negotiation of contracts or alterations in them" (687), which the Act leaves for resolution to the processes of mediation. See Elgin, J. & E. R'y v. Burley, 325 U.S. 711, 722-24 (1945). The Act's provisions for boards of adjustment serve the same function as provisions for arbitration under the typical collective bargaining agreement - a means for deciding "the smaller differences which inevitably appear in the carrying out of major agreements. . ." 325 U.S. at 724.

As long as it appears that the underlying collective bargaining agreement is still in effect, all disputes as to grievances and their processing should be solved by resort to the System Board of Adjustment, and courts will not permit this machinery to be paralyzed by unilateral action on the part of either

the carrier or the representatives of the employees. See IAM v. Central Airlines, supra; Aaxico v. ALPA, supra.

The collective bargaining agreement between Eastern and FEIA was signed on December 31, 1958. By its terms, it was to continue in force until April 1, 1960, renewable thereafter on a yearly basis until notice of a desire to change the agreement was served by either party on the other prior to April 1st of any year. Such a notice was sent by FEIA on February 8, 1960. Negotiations between the parties continued intermittently until February 1962, and were followed by the appointment of a presidential emergency board under Section 10 of the Act. The Board filed its report to the President on May 1, 1962, and the freezing of the situation which had been caused by the appointment of the emergency board ended thirty days later. After June 1, 1962, the contract was no longer in effect and the union was free to strike. FEIA v. Eastern Air Lines, 208 F. Supp. 182 (S.D.N.Y.), aff'd per curiam, 307 F. 2d 510 (2d Cir. 1962), cert. denied, 372 U.S. 945 (1963). Unlike the collective bargaining agreement considered in Manning v. American Airlines, 329 F. 2d 32 (2d Cir.), cert.denied, 379 U.S. 817 (1964), the status quo provisions of the Railway Labor Act had ceased to operate. Nor does FEIA suggest the existence of any conduct on the part of both parties which could serve as the basis for an argument that the parties had agreed to keep the former contract in effect although it was extinct by its own terms. The time for economic warfare had arrived, and the battle was not slow in coming.

Under such circumstances, what purpose could be served by maintaining the System Board of Adjustment? Presumably, it was still the appropriate forum for the assertion of rights which had arisen while the collective bargaining agreement was still in effect, see Elgin, J. & E. R'y v. Burley, 325 U.S. 711, 723 (1945). Conceivably it was the appropriate forum to consider the fairness or disciplinary action against the strikers, if a new agreement eventually was reached between Eastern and FEIA. International Air Line Pilots Ass'n v. Southern Airways, Inc., 44 CCH Lab. Cas. ¶17,460 (M.D. Tenn. 1962). But no such rights are asserted here. The only "grievances" are those arising from the replacement en masse of the strikers, which began after the agreement had ceased to be effective. Even if we assume that this issue, despite its large scale, would have been a "minor" dispute to be resolved by the System Board had the agreement remained in effect, the agreement was no longer in effect. All-out economic war had begun, and the replacements were Eastern's answer to FEIA's strike. Under such circumstances, Eastern was not under an obligation to maintain the System Board so that it could hear disputes of this sort. Cf. Manning v. American Airlines, 221 F. Supp. 301 (S.D.N.Y. 1963), aff'd, 329 F. 2d 32 (2d Cir.), cert. denied, 379 U.S. 817 (1964).

In summary, FEIA bases its appeal largely upon the theory that there were genuine issues of material facts relating to (1) the discharge of FEIA engineers and their replacement by ALPA pilots; (2) Eastern's refusal to bargain in good faith; and (3) Eastern's efforts to promote ALPA as the bargaining agent

instead of FEIA. However, the trial court has found that "since the agreement between Eastern and FEIA was no longer in force, Eastern was under no obligation to re-employ all the strikers" (243 F. Supp. at 708). The Court concluded that the "additional claims advanced by FEIA do not change the nature of the controversy as found by the Court of Appeals" (p. 708).[2] As to reinstatement and damages, it would follow, as the trial court held, that "since the Court is without jurisdiction of the subject matter, it is equally without jurisdiction to direct the reinstatement of the strikers or to award damages" (p. 708).

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[2] IAM v. International Aircraft Services, 302 2d 808 (4th Cir. 1962), on which FEIA relies, is readily distinguishable. In that case, arising not under the Railway Labor Act but under the National Labor Relations Act, the court held that an employer could not avoid a duty to arbitrate grievances with a union on the grounds that the union, because of the employer's allegedly unlawful replacement of union members, no longer represented a majority of the work force. Apart from the obvious differences between the breadth of the arbitration clause, there in question and the jurisdiction of the boards of adjustment under the Railway Labor Act, the union and the employer there had entered into a new collective bargaining agreement which was explicitly made retroactive to the termination date of the old agreement.

instead of FEIA. However, the trial court has found that "since the agreement between Eastern and FEIA was no longer in force, Eastern was under no obligation to re-employ all the strikers" (243 F. Supp. at 708). The court concluded that the "additional claims advanced by FEIA do not change the nature of the controversy as found by the Court of Appeals" (p. 708).[2] As to reinstatement and damages, it would follow, as the trial court held, that "since the Court is without jurisdiction of the subject matter, it is equally without jurisdiction to direct the reinstatement of the strikers or to award damages" (p. 708).

APPENDIX E

A COMPILATION OF STATEMENTS BY EXPERTS IN THE AVIATION INDUSTRY DENOUNCING ALPA'S IMPOSITION UPON EASTERN AND OTHER MAJOR AIR LINES OF THE REQUIREMENT, COMMENCING IN 1959 AND 1960, OF CARRYING A USELESS THIRD PILOT IN ALL JET COCKPIT FLIGHT CREWS:

1. Airline Industrial Relations, Pilots and Flight Engineers,

by John M. Baitsell, Associate Professor of Business Administration, Member of Labor Relations Faculty, Harvard Business School (Published 1966, by Division of Research, Harvard Business School); Excerpts Follow:

"This analysis leads one to question the judgment of the ALPA leadership over the period 1954 to 1964. In 1954 and again in 1956, ALPA endorsed a policy to the effect that the third crew member on jet aircraft would have to be pilot qualified. As originally conceived, the third crew member would have to be on the pilot's seniority list and a fully qualified pilot able to fly the aircraft. ALPA created this policy presumably based on safety but in fact such a policy was unneeded from a safety standpoint. As has been pointed out, American Airlines, several international airlines, and the U.S. Air Force have flown these planes successfully with no compromise to safety without a third pilot. The FAA consistently maintained that a pilot's qualifications for a third crew

member was unnecessary. In spite of the unnecessary qualifications which ALPA created, it was able to force at least a good measure of its policy on the domestic airlines. ALPA was unable, however, to obtain full compliance with this 1956 policy. At four carriers ALPA was able to get rid of FEIA (Flight Engineers International Association) or IAM and to obtain most of the third crew member jobs for pilots. . . . ."

"In another sense, however, by taking a strong policy stand with perhaps extreme qualifications, ALPA could appear to yield gracefully to the recommendations of presidential emergency boards and to other pressure from the government....."

"Thus, by taking a very strong position early ALPA throughout this decade was able to back off from aspects of its policy and to appear to be yielding to demands of the situation. One must keep in mind, however, that no real need existed for the policy in the first instances."

2. Federal Aviation Agency (FAA) Statement During June, 1960:

"By agreement entered into between ALPA and certain air carriers, an additional pilot flight crew member has been assigned to assist the pilot in command in the operation of . . .jet airplanes. This agreement was entered into notwithstanding the fact that such airplanes were

certified for safe operation by the FAA with a minimum flight crew of two pilots and a flight engineer. Moreover, these airplanes are still being operated safely with such a flight crew complement by all of the other air carriers not parties to such an agreement."

3. Statement by Pan American Airways, June, 1960:

"Replacement of Flight Engineers by Pilots asked

"ALPA has also proposed that Pan American's flight engineers be displaced by pilots on all jet aircraft. This displacement would violate a collective bargaining agreement with the Flight Engineers International Association AFL-CIO, extending until June, 1960, which was reached on the basis of terms proposed by the National Mediation Board.

"Your Company has a long and satisfactory history of dealing with its present flight engineer employees. They have earned the right to protection and consideration of their job rights. For ALPA to force their replacement by pilots would be wholly unfair.

"The practical relationship between pilots and the professional flight engineers has resulted in efficient and safe operation in the past, both on Pan American and other major trunk lines. On these major trunk lines, five out of six flight

engineer jobs are held by professional engineers.

"The related proposal, that the company establish a school and training facilities to train all pilots as flight engineers within one year, is, of course, out of the question. In addition to the huge and completely unnecessary cost of such a training program, it would require taking each pilot off flight duty for several months during a single year. This would disrupt flight operations to a critical point."

4. Statement by American Airlines President, July 1958:

"The point at issue is whether or not the flight engineer, in addition to proving his competency according to the standards of the CAB, should also be required to have the ability to fly the airplane. If the flight engineer must be a pilot, in addition to the other duties of his profession, then the obvious end result of that requirement would be to increase job opportunities for pilots, with a reduction in job opportunities for flight engineers who are not pilots. To that requirement, and to that end result, the flight engineers have objected. The facts of the situation are that there is need for the services of a flight engineer, and there is no need for the services of a third pilot. There are two competent qualified pilots on the airline planes and that number has been found sufficient by the CAB, by airline

experience and by the judgment of airline management.

". . . It is the opinion of the management of American Airlines, Inc., that the highest standards of operating safety will accrue if the different members of the flight crew are required to have proven competency in their own professional field. It is our opinion, preferable, as contributing most to safety, that the flight engineer prove and maintain his competency in his own field, that of flight engineer . . ."

5. Statements by National Airlines:

(a) January 1959;

"The President of the Air Line Pilots Association has been successful in forcing a few airlines to carry a third pilot on jet aircraft for what he terms 'safety reasons' - a phrase used whenever his demands are not supported by logic, reason or facts.

"Here again our jet experience totally refutes the union's efforts at featherbedding on the jets, national operated 64,827,000 jet passenger miles between New York and Miami, between December 10, 1958 and May 15, 1959, with a flight-deck crew consisting of captain, copilot, and the flight engineer; and we propose to continue with this set up. As a matter of fact, adding a third pilot to the flight crew is imposed as a type of

penalty by this association because the airlines have a valid contract with the Flight Engineers' International Association which the Air Line Pilots' Association would like to take over. Its ambitions are understandable but not praiseworthy."

(b) November, 1961;

"On the subject of qualifications, the October 17, 1961 report, at page 12, states that the flight engineer who is to serve on a three-man Turbo jet crew, shall have: (b) ability to manipulate the flight controls of the Turbo-jet airplane by reference to flight instruments to the following extent: straight and level flight, normal turns, climbs, and descents at the various normal operating speeds, but not including takeoffs and landing; (c) the training for the demonstration of the ability required by paragraphs (a) and (b) immediately above may be accomplished in a Turbo-jet simulator.

"The commission makes this recommendation '. . . in the event of an emergency created by the incapacity or unavailability of one of the two pilots. . .' This recommendation is without value, provides the ALPA with a 'face-saver', and is not in keeping with the first principle listed at page 36 of the commission's May 24, 1961 report. It does not foster safety, efficiency, and economical operation of the aircraft. In our opinion, the reverse is true - it is unsafe.

"The Federal Aviation Agency, charged with establishing and enforcing the standards to be met by flight crews, has already established the standard to be met by flight engineers on Touro-jet equipment. The Federal Aviation Agency does not require that a flight engineer on Turo-jet equipment, or any equipment, possess any pilot qualifications, or that he be given any pilot training - in a simulator or otherwise."

6. Statement by Pan American World Airways (Vice-President, E. M. Goulard), Sept. 8, 1958:

". . . We have signed a contract with the Flight Engineers International Association under which our professional flight engineers will perform the flight engineering function aboard jet aircraft. We have determined that it is not necessary or advisable that the occupants of the flight engineer station have pilot training, because we see no advantage to the company or to the pilots or to the flight engineers aboard jets in requiring training not reasonably related to the function to be discharged. . ."

7. Statement by Pan American Executive (Vice-President, Harold Gray), November, 18, 1958:

". . . In the meantime, the company is most desirous of settling the dispute through negotiations since any further delay is costly to all concerned. The principal issue, other than the pay scale, is

whether ALPA may demand the addition of an extra pilot regardless of government regulations and company policy. The company's position on these matters is as follows. Safety regulations issued by the CAB always have been and will continue to be complied with. The company feels that maximum safety will be obtained by continuing past practice rather than by adopting the pilots' union proposals. It desires to continue to use the professional Flight Engineer, who comes to this job with experience as a mechanic or an engineer, selected for his high degree of mechancial aptitude and who has perfection in this job as his primary ambition. . . ."

". . . We believe that no seriously dilute any pilot's opportunity for experience as a copilot at the controls or in command works against maximum safety. This is the result of assigning an unnecessary pilot to a crew. . . ."

". . . . The company believes that the old adage 'There is safety in numbers' is 180° wrong when numbers of pilots aboard an aircraft are increased unnecessarily."

8. Statement by Trans World Airlines (TWA), April 1962:

". . . So far as the company was concerned, the second officer was unnecessary for safe or otherwise operation of a Turbo-jet airplane. He is not required on a Turbo-jet airplane by the Federal Aviation authority. The plane was not certified to fly with him. The

manufacturer did not design the plane with a second officer in mind. The second officer has no flight controls at his station. He sits in a seat, as shown on company's Exhibit 6, directly behind the Captain, and about the only flight equipment furnished him is a radio head set and an oxygen mask."

9. Statement by S. L. Shannon, Senior Vice President of Operations, Eastern Air Lines, Inc., April, 1960:

". . . As far as I can tell, the association (ALPA) had never abandoned its idea that it was going to get rid of the flight engineers, one way or the other, and I always look at this flight engineer training for the pilots as a step in that direction. Now, that is my opinion. That is not necessarily a fact. That is just my opinion."

". . . I told them when they (ALPA) brought in this proposal of the 18th of November that we had no intention of kicking the flight engineer out of the plane and going along with their demands. . . ."

"Well, it would more or less eliminate them from the turbine aircraft on its face, unless he could be carried in the baggage department, or back there in the air, but he would be more or less eliminated from the cockpit."

10. Eastern Air Lines, Inc., June 1960:

". . . Eastern's third pilot on its DC-8-B aircraft is assigned

certain pilot duties which are performed by the Captain and second pilot on other types of Eastern's aircraft. The duties performed by Eastern's third pilot on the DC-8-B are performed by the Captain and second pilot on National's and Delta's aircraft on the same or similar types."

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 24626

JOHN A. ACREE, ET AL.,
Appellants,

versus

AIR LINE PILOTS ASSOCIATION, ET AL.,
Appellees.

Appeals from the United States District Court for the Northern District of Georgia.

(February 13, 1968.)

Before BROWN, Chief Judge, and GEWIN and WRIGHT,* Circuit Judges.

WRIGHT, Circuit Judge: On June 23, 1962, the employees of Eastern Air Lines represented by the Flight Engineers International Association (FEIA) went on strike over the question of representation of cockpit personnel, a problem which has plagued the

* Of the District of Columbia Circuit, sitting by designation.

airlines industry since the advent of jet aircraft. In essence the dispute was a jurisdictional one between rival unions, FEIA and the Air Line Pilots Association (ALPA). The history and outcome of the dispute has been fully set out elsewhere,[1] and need not be repeated here. In the end, ALPA prevailed and in 1964 was certified by the National Mediation Board as the bargaining agent for Eastern's flight engineers. In the meantime the striking FEIA members had been replaced.

This suit is but the latest effort in an extended series of unsuccessful administrative and judicial proceedings which FEIA has brought against Eastern and ALPA charging a conspiracy between them to force FEIA members to go on strike and lose their jobs.[2] But unlike its predecessors, which were brought in the name of the union, the present litigation is a class action brought in the names of appellants individually and as representatives of all permanently replaced flight engineers who struck Eastern on June 23, 1962. The claim here is for reinstatement by Eastern and $29,090,100 damages against ALPA. The District Court dismissed the complaint for lack of subject matter jurisdiction and, alternatively, as barred by *res judicata*. We find the claim barred by *res judicata*, consequently we do not reach the other basis for dismissal below.

[1] *See Flight Engineers International Ass'n v. Eastern Air Lines, Inc.*, S.D. N.Y., 243 F.Supp. 701 (1965), *affirmed*, 2 Cir., 359 F.2d 303 (1966).

[2] For a chronicle of the various proceedings which preceded the instant litigation, *see Flight Engineers Int. Ass'n, EAL Chapter v. Eastern Air Lines, Inc.*, 2 Cir., 359 F.2d 303, 306-307 (1966).

In our judgment the Second Circuit's decision in *Flight Engineers Int. Ass'n, EAL Chapter v. Eastern Air Lines, Inc.*, 359 F.2d 303 (1966), which affirmed the District Court's grant of summary judgment in favor of Eastern and ALPA for "lack of jurisdiction over the subject matter," adjudicated the same claims which appellants now seek to raise before this court. Since, in our view, the suit is also between the same parties and seeks the same remedies, principles of *res judicata* foreclose our consideration of these claims. The questions whether the two suits involve the same parties or their privies and the same cause of action are but two sides of the same coin. Nevertheless we shall try to analyze them as separate issues.

Same Cause of Action.

Stripped of nonessential allegations, the original complaint and the amended complaint in this case allege a conspiracy between ALPA and Eastern to force FEIA to strike so that ALPA members could take the flight engineers' jobs. In the amended complaint the charge of conspiracy as to Eastern was tempered to some extent, but the allegations of wrongdoing and bad faith remain essentially the same. These are the same allegations of wrongdoing which appellants made in their complaint before the Second Circuit. Paragraph 51 of the complaint there alleged that

> "the unlawful refusal of Eastern to reinstate the Flight Engineers to their employment

> [has] caused plaintiff and the members represented by it, damage in the amount of $11,500,000 for back wages and other fringe benefits."

Paragraphs 52, 57, 58 and 63 charged that Eastern and ALPA provoked appellants to strike for the purpose of obtaining their jobs. Paragraph 56 charged a conspiracy between Eastern and ALPA to confer appellants' jobs on ALPA pilots. The New York complaint also prayed for the same remedies sought here:

> "(4) Issue a mandatory injunction against Eastern ordering and directing it to offer to the striking flight engineers reinstatement to their former or substantially equivalent positions, without prejudice to their seniority or other rights or privileges, and ordering and directing Eastern to dismiss, if necessary, any employees hired to replace the striking Flight Engineers * * *."

And, as in the suit here, it asked for huge damages covering back pay and fringe benefits.

Thus the cause of action relied on in the Second Circuit litigation and the one here are identical. The remedy requested is also identical. True the identical words have not been used. The complaints were prepared by different lawyers. But essentially they are the same. What difference exists is in form, and we have long held that in determining *res judicata*

it is the substance of the action that counts. "What is important and determinative now as to the identity of causes of action, is not identity of form, but of grounds." *Wilson Cypress Co. v. Atlantic Coast Line R. Co.*, 5 Cir., 109 F.2d 623, 627, *cert. denied*, 310 U.S. 653 (1940).

In deciding whether the substances of two actions are for *res judicata* purposes the same, various tests have been advanced: Is the same right infringed by the same wrong? Would a different judgment obtained in the second action impair rights under the first judgment? Would the same evidence sustain both judgments? *See* 1B J. W. Moore, Federal Practice ¶ 0.410[1], pp. 1157-1158 (2d ed. 1965), and cases there cited. Under any of these tests the cause of action in suit here is identical with the cause of action alleged in the New York complaint. There may be some difference in the legal theory supporting the actions, but the substance, for *res judicata* purposes at least, is the same. *See Norman Tobacco & Candy Co. v. Gillette Safety Razor Co.*, 5 Cir., 295 F.2d 362 (1961).

Appellants deny that the cause of action here was included in the Second Circuit litigation, arguing that "the second New York proceeding rested wholly upon a cause of action asserting institutional, or recognitional, claims by the plaintiff union there, FEIA as a statutory collective bargaining organization; and that, that said proceeding in no way presented plaintiffs' *individual rights*, asserted here, against

ALPA's hostile and invidious discrimination against plaintiffs individually—not FEIA, and abuse by ALPA of its statutory bargaining franchise and power." (Emphasis in appellants' brief.)

It may be true that the New York proceeding covered institutional claims by FEIA as a collective bargaining agent, but the Second Circuit treated it as also including, as it obviously did, individual claims for reinstatement of its members and back pay. Certainly those claims are the same claims being made here, and the alleged bases for those claims are identical with the bases alleged in the New York proceeding. Under the plain allegations of the two complaints, other than Chinese copies it would be difficult indeed to find causes of action and claims for relief more similar than those asserted in the New York action and those asserted here.

The Same Parties or Their Privies.

In all the prior proceedings the plaintiff was FEIA, an unincorporated association, suing for itself and its members who lost their jobs at Eastern, whereas this is a class action with appellants, members of FEIA, suing individually and for the other members of FEIA who lost their jobs. Thus in effect we have two class actions and the members of the classes are identical. Or as the District Court here held: "In sum, the FEIA was composed of the class which plaintiffs seek to represent; as an unincorporated association, it was no more nor no less than the class itself."

Indeed, even if the second action were not a class action, the individuals actually represented by FEIA would be bound by the first action to the extent their interests were there represented. *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921); *System Federation No. 91 v. Reed*, 6 Cir., 180 F.2d 991 (1950); *Ingersoll v. Brotherhood of Locomotive Engineers*, N.D. Ohio, 192 F.Supp. 669 (1961), *reversed on other grounds*, 6 Cir., 307 F.2d 257 (1962); *Schatte v. International Alliance, etc.*, S.D. Cal., 84 F.Supp. 669 (1949), *affirmed*, 9 Cir., 182 F.2d 158, *cert. denied*, 340 U.S. 827 (1950); 2 W. Barron & A. Holtzoff, Federal Practice and Procedure §§ 562, 563, 572 (Wright ed. 1961 and 1967 Pocket Part). The question then is whether the interests of the individual members of FEIA were raised before and, for *res judicata* purposes, resolved by the Second Circuit.

As we have seen, FEIA did try to present the claims of its individual members, and appellants virtually concede as much. They argue, however, that FEIA was not the proper party to make those claims. To make the argument they rely on language in the opinion of the District Court in the Second Circuit case that the remedy of reinstatement and damages for wrongful discharge "is available only to the individual employees and not to FEIA" and that FEIA was asking for "global damages for alleged wrong to it and not individual damages for such of its members who may have been wrongfully discharged." 243 F.Supp. at 707.

But this language in the District Court's opinion finds no counterpart in the decision of the Court of Appeals. In that court FEIA's claim was limited almost exclusively to the individual rights of the strikers, and the Second Circuit in no way suggested a lack of standing by FEIA to present these individual claims. In fact, it met the reinstatement and damages issues directly, ruling that the striking flight engineers, appellants here, could not be reinstated or awarded damages in the form of back pay without unlawfully attacking the National Mediation Board's certification of ALPA—a matter beyond the court's jurisdiction. "The allegations in the amended complaint which relate to the replacement of the strikers do not directly challenge the representational decision of the Mediation Board; but the judicial relief requested by FEIA flies 'in the teeth of the board's certification' of ALPA, almost as much as a court order directing an employer not to bargain with a union flies in the teeth of the board's certification of that union. * * * The claim for money damages would have a similar effect." *Flight Engineers v. Eastern, supra,* 359 F.2d at 307-308.

There is, then, no question that the Second Circuit considered the claims raised by FEIA in behalf of its individual members and dismissed them for lack of jurisdiction over the subject matter. The only remaining question is whether a jurisdictional decision of this sort is *res judicata* for purposes of the present litigation in this court.

Res Judicata Effect of Jurisdictional Decision.

The doctrine of *res judicata* provides generally that, if a previous judgment is valid, final, and on the merits, it is an absolute bar in another case on the same cause of action between the same parties and their privies "not only in respect of every matter which was actually offered and received to sustain the demand or to make out a defense, but also as to every ground of recovery or defense which might have been presented." *Mendez v. Bowie,* 1 Cir., 118 F.2d 435, 440, *cert. denied,* 314 U.S. 639 (1941); 1B J. W. Moore, Federal Practice ¶ 0.405[3] (2d ed. 1965).

It is sometimes asserted that a decision has *res judicata* effect only if it is on the merits. But this overstates the case, for as the Supreme Court has said, "The principles of *res judicata* apply to questions of jurisdiction as well as to other issues." *American Surety Co. v. Baldwin,* 287 U.S. 156, 166 (1932). *See also Estevez v. Nabers,* 5 Cir., 219 F.2d 321 (1955). It is true that the *res judicata* effect of a jurisdictional decision is more limited than its effect where the decision is on the merits, for it is not binding as to all matters which *could have been raised.* But a non-merits judgment of this type, whether its abating effect be termed direct estoppel (Restatement, Judgments § 49 (1942)) or simply *res judicata, is* conclusive as to matters *actually* adjudged. *Estevez v. Nabers, supra;* 1B J. W. Moore, *supra,* ¶ 0.405[5]. And it is immaterial that the non-

merits judgment may have been erroneous. *Estevez v. Nabers, supra; Catholic Society of Religious & Literary Education v. Madison County,* 4 Cir., 74 F.2d 848 (1935). The question, then, is what did the Second Circuit decide.

The Second Circuit's decision that it lacked subject matter jurisdiction was not based on factors peculiar to that Circuit. Rather it decided that once the National Mediation Board had certified ALPA, federal courts generally were without jurisdiction to consider the sorts of claims for judicial relief (reinstatement and damages) which FEIA made for its individual members in its amended complaint. It said:

> "To grant the judicial relief requested in FEIA's wholesale attack on the replacement of the strikers would directly affect the previous determination of the representational dispute by the National Mediation Board; would reopen a controversy which has plagued the airlines for years and which has been fought to a rough conclusion by resort to the self-help envisaged by the act; and would lay down a precedent that would mean the inordinate protraction of comparable struggles in years to come. For these reasons, we do not feel that courts should consider the claims for judicial relief in FEIA's amended complaint which are directly connected with the replacement of the strikers." (Footnote omitted.) 359 F.2d at 309.

This reasoning applies equally where, as here, the identical suit is brought directly by the individual members as it does where it is brought in their behalf by FEIA. Since the Second Circuit treated the individual claims as effectively raised by the union, we are bound by its dismissal of them for lack of subject matter jurisdiction. Accordingly we affirm the dismissal of this action by the District Court on *res judicata* grounds.

AFFIRMED.

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